EMPLOYMENT TRIBUNALS

Claimant: Miss C Gooding

Respondent: The Felixstowe Dock and Railway Company Limited

HEARD AT: BURY ST EDMUNDS **ON**: 22nd & 23rd May 2017
7th July 2017
11th July 2017 (Discussion Day)

BEFORE: **Employment Judge Laidler**

MEMBERS: Mr C Davie and Mrs L Gaywood

REPRESENTATION

For the Claimant: Ms S Bewley, Counsel.

For the Respondent: Ms C Harrington, Counsel.

RESERVED JUDGMENT

1. **The Claimant's role as Payroll and Pensions Assistant was redundant from the commencement of her maternity leave.**

2. **Regulation 10 of the Maternity and Parental Leave Regulations 1999 therefore applied but there was a failure to consult with the Claimant and/or her union concerning that redundancy.**

3. **The Claimant was treated unfavourably within the meaning of Section 18(4) of the Equality Act 2010**

4. **The Claimant was not subjected to a detriment for making a flexible working request under Section 47(E) ERA and that claim is dismissed.**

5. The Claimant was unfairly constructively dismissed.

REASONS

1. This is the claim of Chloe Gooding arising out of her employment by the Felixstowe Dock and Railway Company Limited. The ET1 was received on the 14th November 2016 in which the Claimant brought complaints of unfair dismissal, pregnancy and maternity discrimination, and notice pay.

2. The Respondent submitted a response denying all the claims.

3. There was a Preliminary Hearing before Employment Judge Sigsworth on the 2nd February 2017 when it was recorded that the claims were as set out in the agreed agenda. These were as follows: -

   (1) Breach of Regulation 18 of the Maternity and Parental Leave Regulations 1999.

   (2) Unfavourable treatment pursuant to Section 18(4) of the Equality Act 2010.

   (3) Constructive Unfair Dismissal.

   (4) Suffering a detriment for applying or proposing to apply for a change in hours pursuant to Section 47E of the Employment Rights Act 1996.

4. Only two days had been allocated to the case which all agreed was not sufficient to hear all the evidence, submissions and for the Tribunal to deliberate. The two days listed were utilised for some of the evidence and then when the Tribunal resumed on the 7th July 2017 it heard from Mr Seaman, and heard Counsel's submissions. The decision was reserved and the tribunal met in Chambers to reach its decision on the 11th July 2017.

5. The Tribunal heard from the Claimant and Mr Mark Duffield her Trade Union Representative on her behalf, and for the Respondent from: -

   Mrs Lisa Wilkes
   Mr Steve Ashbee
   Mr Mark Seaman

6. The Claimant had tendered a witness statement from Mr Martyn Valentine, Payroll Manager for the Respondent dated the 28th April 2017. He did not attend for cross examination and consequently limited weight if any has been given to this statement.

The facts

7. From the evidence heard the Tribunal finds as follows.

8. The Claimant's Contract of Employment records that her appointment commenced on the 25th June 2012 and is described in the contract as Pensions and Payroll Assistant reporting to Lisa Wilkes as the Group Pensions Manager and Martyn Valentine as Payroll Manager. Her duties were set out in the attached job description. Clause 7a of the contract provided that 'this may be reviewed from time to time by the Company and any changes agreed either with yourself, your representative or by union representation'.

9. This job description was entitled 'Payroll and Pensions Assistant' and the job purpose described as:

> *'To assist in the administration of payrolls for Hutchinson Ports (UK) and related companies and take responsibility for specific payrolls as allocated by the Payroll Manager.*
>
> *Responsibility for the internal administration of the group personal pension plan.*
>
> *Day to day maintenance and accurate recording of individual member records with close liaison with provider and 3rd Party. General duties within the Pensions Department.*
>
> *To assist time office by entering data into the Labour Management System (LMS), monitoring payroll records and process reports.*

10. The role had no line management responsibility but the Claimant was responsible for the day to day organisation of her own work. The experience and knowledge required for the role was recorded as '2-3 years payroll experience within a large organisation and with a general understanding of DC pension arrangements.'

11. Although the Tribunal heard that the Claimant had done some accountancy training in a previous role this was not required for the role with the Respondent. The Claimant had undergone training with the Respondent but for the payroll aspect of the job and that had been one day a year. The Claimant accepted in cross examination she had not requested whilst with the Respondent to undertake any accountancy training. Although the Tribunal is satisfied that the Claimant's role was clearly an important one within the department, it was and remained an administrative one and not an accountancy role as such.

12. As the contract records the Claimant reported to both Lisa Wilkes and Martyn Valentine. From the evidence heard the Tribunal is satisfied that Lisa Wilkes conducted all the formal HR roles in relation to the Claimant

such as appraisals, any absence requests be they leave or otherwise but when the Claimant was working in Payroll she would report to Mr Valentine.

13. The Respondent had several policies relevant to the circumstances in this case.

Flexible Working

14. This policy basically sets out the position as is found in the Employment Rights Act 1996 about the right to request flexible working. It specifically provided at Section 5 how to make the request and set out as follows: -

> **5. Making a Flexible Working Request**
>
> 5.1 You will need to submit a written application if you would like your flexible working request to be considered.
>
> 5.2 Your written and dated application should be submitted to your line manager and, in order to meet the requirements of the procedure and to help your line manager consider your request, should:
>
> (a) state whether your request is a statutory request or an informal request;
>
> (b) if you are making a statutory request, provide information to confirm that you meet the eligibility criteria set out in paragraph 4;
>
> (c) state the reason for your request;
>
> (d) provide as much information as you can about your current and desired working pattern, including working days, hours and start and finish times, and give the date from which you want your desired working pattern to start;
>
> (e) identify the effect the changes to your working pattern will have on the work that you do, that of your colleagues and on service delivery and business performance. If you have any suggestions about dealing with any potential negative effects, please include these in your written application;
>
> (f) state whether you have made a previous statutory request or informal request for flexible working and, if so, when; and
>
> (g) be submitted in good time and ideally at least 2 months before you wish the changes you are requesting to take effect.
>
> 5.3 We might be able to agree your proposal without the need for a meeting (which is the next stage of the procedure). If that is the case, your line manager will write to you, confirming the decision and

explaining the changes that would be made to your contract of employment, if you accepted.

5.4 If your proposal cannot be accommodated, discussion between you and your line manager may result in an alternative working pattern that can assist you.

5.5 All requests will be handled on a "first come, first served" basis unless they are statutory requests which will take priority over informal requests.

15. Regarding a meeting, this would be held "where necessary" by the Line Manager within 28 days of the request. The employee could bring a Trade Union Representative or colleague if they so wished.

16. Section 7 dealt with the communication of the decision.

7. Procedure: Decision

7.1 Following the meeting, your line manager will notify you of the decision in writing within 14 days.

7.2 If your request is accepted, or where we propose an alternative to the arrangements you requested, your line manager will write to you with details of the new working arrangements, an explanation of changes to your contract of employment and the date on which they will commence. You will be asked to contact the Pensions Department to discuss any impact that the proposed changes may have on your pension arrangements before you sign and return a copy of the letter. This will be placed on your personnel file to confirm the variation to your terms of employment.

7.3 Unless otherwise agreed in writing changes to your terms of employment will be permanent. Any changes which last longer than a year will be deemed as permanent. Temporary changes will only be considered in respect of statutory requests.

7.4 If your line manager needs more time to make a decision, they will ask you for your agreement to delay the decision. A request for an extension is likely to benefit you. For example, your line manager may need more time to investigate how your request can be accommodated or to consult several members of staff.

7.5 There will be circumstances where, due to business and operational requirements, we are unable to agree to a request.

In these circumstances, your line manager will write to you:

(a) giving the business reason(s) for turning down your request;

(b) explaining why the business reasons apply in your case; and

(c) setting out the appeal procedure.

Maternity/Adoption Leave Policy

17. The relevant section here dealt with the "Keeping In Touch (KIT)" Days at Section 16 and provided as follows: -

16. Keeping in Touch (KIT) Days

16.1 Except during the first two weeks after childbirth, an employee can agree to work for the company (or to attend training) for up to 10 days during OML/OAL without that work bringing the period of her maternity/adoption leave to an end and without the loss of SMP/SAP. These are known as 'keeping-in-touch' (KIT) days. Any work carried out on a day shall constitute a day's work for these purposes.

16.2 The company has no right to require the employee to carry out any work, and the employee has no right to undertake any work, during a period of maternity/adoption leave. The company pays employees for the actual hours worked on keeping-in-touch days at their standard rate of pay. This amount is offset against SMP/SAP received (where eligible). However, employees have no contractual right to be paid for KIT days and this policy can be changed by the company without notice. If KIT days are undertaken during periods of unpaid maternity/adoption leave, this will have an impact on the employee's pension contributions. Any KIT days worked do not extend the period of maternity leave. Once the KIT days have been used up, the employee will lose a week's statutory maternity/adoption pay for any week in which she has worked.

16.3 While there is no obligation on the employee to agree to attend a KIT day, the employee's manager may use this provision in a number of ways to ensure that contact is maintained with the employee during their maternity/adoption leave and that they are kept informed of developments.

17. Contact During Maternity/Adoption Leave

17.1 Prior to an employee going off on maternity/adoption leave their line manager should normally arrange a meeting with then to agree the level of contact and best form of contact during maternity/adoption leave. The employee's line manager will aim to make reasonable contact with the employee during their maternity/adoption leave, either by telephone, email or letter, as well as notifying them of any major developments or important events taking place during their absence (for example, company communications or internal changes to departments).

17.2 It is recommended that the line manager keeps a note of contact made with the employee and any discussions that took place to ensure they are aware of when next to contact the employee and any actions they are required to undertake.

19. Varying Employees' Hours on Return from Maternity/Adoption Leave

It is the company's policy to be flexible on working hour arrangements for all employees, in particular when an employee returns to work following a period of maternity/adoption leave. For further details please refer to the Flexible Working Policy.

18. The Claimant notified the Respondent of her pregnancy by letter of the 14th September 2015. She commenced her maternity leave on or around the 7th December 2015 and was due to return to work on 1st October 2016.

19. In early November 2015, a temporary worker had been recruited to cover the Claimant's pension administration duties prior to the Claimant commencing a period of annual leave before her maternity leave. That temporary worker terminated their employment at the end of November 2015 prior to the Claimant commencing her maternity leave. The Respondent continued to look for a suitable replacement to temporarily cover the Claimant's pension administration duties and a new temporary worker was recruited in February 2016. This person initially worked 3 days a week to assist with the backlog of work that had been generated since the end of November. This then reduced to 2 days a week from the 1st May 2016. This temporary worker subsequently applied for the Pension Assistant role as part of the recruitment process to fill the vacancy following the Claimant's resignation. The person was successful and was appointed to the role on a permanent basis on 12th December 2016 working 2 days per week.

20. The Respondent did not need to appoint anyone to cover the Claimant's duties in payroll. Julie Lewis reduced her hours in payroll from the 30th March 2016.

KIT Days

21. By email of the 4th February 2016 Martyn Valentine notified that the Claimant would be in for payroll training on 19th February 2016 so that was to be recorded as her first KIT day. She did not attend as she was unwell on that day.

22. The next KIT day was 17th June 2016. The Tribunal saw handwritten and typewritten notes of this meeting. The Claimant confirmed that they were a fair summary of the points discussed. In this it is recorded that the Group Personal Pension Plan procedures had been updated and the Claimant was told this, there was some discussion about the Claimant coming back but she made it clear that she had not come to any final view yet. Later in the day the Claimant advised that she would arrange other days with

Martyn Valentine but was told by Lisa Wilkes that they must be arranged through her.

23. There was clearly a telephone call between Lisa Wilkes and the Claimant on 12th July 2016. The Claimant had sent a text message to her on the 7th July 2016 stating "Martyn briefly mentioned coming in for a few hours on Friday 22nd to do payroll work again" she questioned whether Lisa would also like her to do some pension work one day, and that appears to have led to this telephone call. In the telephone call Lisa Wilkes, can be seen as stating that that date would not be convenient for her as she was too busy prior to going on annual leave, and that KIT days needed to be arranged through her and not Martyn Valentine. There is a note that she said that on these days the Claimant needed to look at "all aspects of work and changes, keeping up to date etc not to work a whole day (in payroll)". In cross examination Lisa Wilkes was asked several times why the Claimant could not come in and work on payroll that day. The only answer given was that Lisa Wilkes wanted to be there when the Claimant came in and that it was not the idea of a KIT day to do work, it was to keep in touch with all departments. The Tribunal finds that response to be contradictory to the Respondent's own policy which makes it clear at 16.1 that the employee can agree to work for the company for up to 10 days during her maternity leave which the Claimant was clearly offering to do. Although the company has no right to require the employee to carry out work the employee can agree to do work. Clearly the intention of the KIT day is not only to attend the office but to ensure that the employee who has been absent is remaining in contact with working practices and even being given the opportunity to perform some work whilst there. The policy particularly states at 16.3 that the employee's manager "may use this provision in a number of ways to ensure that contact is maintained with the employee during their maternity/adoption leave and they are kept informed of developments". The policy further goes on to say at section 17 that the Line Manager will aim to make reasonable contact with the employee during such leave "as well as notifying them of any major developments or important events taking place during their absence (for example, company communications or internal changes to departments)".

24. Mr Seaman gave evidence in his witness statement at paragraph 13 that at the start of the Claimant's maternity leave he discussed resource requirements with both the Payroll and Pensions Managers (Martyn Valentine and Lisa Wilkes) and was advised by Martyn Valentine he did not need any cover and could operate without the need to have a temporary resource. Lisa Wilkes advised that she needed resource and consequently he approved the recruitment of a temporary person for 3-4 days per week. The Tribunal is satisfied that even at the beginning of the Claimant's maternity leave the need of the Respondent for employees in the Payroll and Pensions Departments had reduced and that is self evident by the fact that they only took on temporary cover for part of the Claimant's role and Julie Lewis then reduced her hours.

25. By email of the 14th July 2016 the Claimant wrote to Lisa Wilkes asking "Why I have now been refused my arranged keep in touch day on Friday 22nd July which I would have run the payroll processes". The reply came on the 19th July when Lisa Wilkes stated that this could be discussed at the meeting on the 20th to deal with the flexible working request.

The Claimant's Flexible Working Request

26. By letter of the 12th July 2016 the Claimant submitted a formal request to change from full time to part time employment following her return from maternity leave on the 1st October 2016. She made a very specific request which was as follows: -

> *"…I wish to work as a Payroll Assistant: 2 days a week working Thursday and Friday. I am also willing to change to work a Tuesday when cover is needed for the weekly payroll, as long as I am given reasonable time to arrange child care."*

27. It is to be noted that the Claimant was asking to come back only as a Payroll Assistant. As has been recorded her job title was 'Payroll and Pensions Assistant'. The Claimant was therefore asking to return to only part of that role.

28. Mr Seaman in his witness statement at paragraph 16 states quite clearly that the decision in respect of the available role to the Claimant was made by him. This was at a meeting ***prior to*** the Claimant's request for flexible working that he had with Jamie King, Lisa Wilkes and Martyn Valentine. They discussed how the areas had been operating for the past 6 months and the requirements for the future. He went on: -

> *"It was clear to me that the Pensions area needed to continue with the Assistant role, a role that continued to be covered by a temporary person but that the Payroll area had operated well with reduced resource and that the only issue was that of emergency cover. I noted that the ResourceLink system had reduced that risk and therefore that I was comfortable with the level of resource in payroll."*

29. He confirmed in paragraph 17 that the outcome of that meeting was that the resource should be directed to the Pensions area. He approved in principle a role to be within the pensions area although as that would be a new role it would need to go through their "Internal Governance" and be signed off by the HR Director and CEO.

30. In oral evidence Mr Seaman sought to suggest that "the timing was slightly out" in relation to this meeting and that it would have been near the time of the request for flexible working. It would have been a meeting however he would have called in any event.

31. The Tribunal finds this inconsistent with his written witness statement which very clearly says that he had a meeting "prior to Miss Gooding's request for flexible working", and the Tribunal is satisfied that the decision had already been taken that any available role would be in the Pensions side of the department.

32. There was a further meeting on the 15th July 2016 to discuss the resource requirement, the outcome was that it would be a Pension focused role.

33. The meeting with the Claimant did not take place until the 20th July 2016, and this was attended by her with Mark Duffield, Steve Ashbee from HR and Lisa Wilkes. Some very brief notes of the meeting were seen at page 76 of the bundle where the Claimant appeared to be offered 2 days in Pensions. There is a note that there was "no resource requirement in Payroll".

34. Lisa Wilkes in her oral evidence confirmed that the decision that there was no resource requirement in Payroll was made at a meeting attended by herself, Martyn Valentine, Jamie King and Mark Seaman and that it was Mark Seaman her direct reporting line manager that made the final decision. That coincides with Mr Seaman's evidence at paragraph 16 of his witness statement. Ms Wilkes only referred to the 15th July 2016 meeting in her witness statement and not to any other.

35. Following the meeting with the Claimant Steve Ashbee wrote to her on the 21st July 2016 to confirm they could accommodate the Claimant's request to work part time on a Thursday and Friday each week following her return from maternity leave but that this role would be as "Pensions Assistant". What this letter did not do was set out the business reasons why the Respondent could not accommodate the flexible working request that the Claimant had made which was to work those 2 days but as a Payroll Assistant. They did not set out the business reasons listed in their own policy at 7.6 which made that impossible to grant and why that request was rejected.

36. Even before that letter was sent the Claimant emailed Mr Ashbee on the 21st July 2016 at 11:49 asking what would be the position if she was to return full time.

37. By email of the same date Mr Ashbee said he was surprised the Claimant was considering full time working as he said that had not been put forward as an option at the meeting. He confirmed he had sent her a letter covering the points that had been discussed and attached an electronic copy. He asked her if she wished to pursue her request.

38. The Claimant replied acknowledging receipt of the letter and that the full-time option had not been responded to. She had not discussed that at the meeting because she had become upset at the way the meeting was progressing.

39. Lisa Wilkes gave evidence that there was a discussion between herself and Mark Seaman on or about the 22nd July 2016 which is not covered in anyone's witness statement. Mr Seaman is responsible for both Pensions and Payroll, and it was following this discussion that Steve Ashbee was instructed to write to the Claimant which he did on the same date at 18:24.

40. By that email of the 22nd July 2016 Steve Ashbee advised the Claimant that if she was to return to work full time "we can offer you the Pensions Assistant position for 5 days per week". Again, no business reasons were given as to why this was not the Payroll and Pensions Assistant or indeed just Payroll as the Claimant had requested.

41. The substantive response was sent by the Claimant on the 2nd August 2016. The Claimant now took issue with the fact that during the meeting she had been verbally advised that there was no position in Payroll, but that had not been stated in the letter, she asked that this be confirmed to her. Regarding a meeting on the 16th August 2016 the Claimant asked if that was to be a KIT day working with the department afterwards.

42. She subsequently advised that her son's hospital appointment had been rescheduled to the 16th August 2016 and therefore needed to cancel that meeting.

43. Lisa Wilkes replied on the 4th August 2016 stating that if the 16th was not convenient they could arrange a face to face meeting or conference call for a later date. She did not answer any of the Claimant's queries about the Payroll position. In a subsequent letter, Lisa Wilkes confirmed a meeting booked for the 17th August 2016.

44. By email of the 10th August 2016 the Claimant again asked that if she returned full time she understood it would not be in Payroll and asked "Please just confirm that I am correct so I can make my choices accordingly".

45. Lisa Wilkes responded on the same day that she hoped they could address her concerns at the meeting. As outlined in Steve Ashbee's letter they could accommodate the flexible working request. Should the Claimant wish to withdraw the request she would return on full time hours working within the Pensions Department.

46. By email of the 16th August 2016 the Claimant submitted her resignation to the Respondent and confirmed that she would not be attending the meeting the following day. The actual letter of resignation made it clear that the Claimant believed that she was not being permitted to return to her former role. She felt deeply passionate about her role in Payroll and felt that working wholly in Pensions would be "mundane and de-skilling". She therefore made a decision that being forced into Pensions was tantamount to a fundamental breach of contract as was the way the company had gone about forcing that change. She tendered her resignation and intended to

bring a claim for constructive unfair dismissal together with a claim under the Equality Act 2010.

47. Lisa Wilkes responded on the same day stating she was disappointed the Claimant had resigned and had been hopeful that the Claimant would have attended the meeting and would be returning in the near future. HR would however now be processing her date of leaving effective from 4 weeks from that date.

48. The Tribunal heard from Mark Duffield the Claimant's Trade Union Representative from Unite. He attended the meeting with her on the 20th July 2016. Regarding matters occurring during her maternity leave it was clear that Mr Duffield was never approached with regard to consultation with him and the Union concerning changes in the Pensions and Payroll Departments. He gave evidence which the Tribunal accepts that usually when there are changes to be made he would be consulted with and be part of a job evaluation process about the changes in the role.

49. The Tribunal accepts that Mr Ashbee's position at that meeting was that he was not saying the Claimant was being made redundant as the Respondent had continued to deny in these proceedings. Mr Duffield accepted in cross examination that although he described Mr Ashbee as becoming angry he did not consider it was such conduct as to warrant any formal complaint.

Relevant Law

50. **Maternity and Parental Leave Regulations 1999**: -

Regulation 18(2): -

> *"An employee who takes additional maternity leave, or parental leave for a period of more than four weeks, is entitled to return from leave to the job in which she was employed before her absence, or, if it is not reasonably practicable for the employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her to do in the circumstances."*

Regulation 18A

(1) *An employee's right to return under regulation 18(1) or (2) is a right to return –*
   (a) *With her seniority, pension rights and similar rights as they would have been if she had not been absent, and*
   (b) *On terms and conditions not less favourable than those which would have applied if she had not been absent.*

Regulation 10 - Redundancy during maternity leave: -

"(1) This regulation applies where, during an employee's ordinary or additional maternity leave period, it is not practicable by reason of

redundancy for her employer to continue to employ her under her existing contract of employment.

(2) Where there is a suitable available vacancy, the employee is entitled to be offered (before the end of her employment under her existing contract) alternative employment with her employer or his successor, or an associated employer, under a new contract of employment which complies with paragraph (3) (and takes effect immediately on the ending of her employment under the previous contract).

(3) The new contract of employment must be such that—

(a) the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and

(b) its provisions as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not substantially less favourable to her than if she had continued to be employed under the previous contract."

Regulation 2(1) defines 'job' as: -

"in relation to an employee returning after additional maternity leave or parental leave, means the nature of the work which she is employed to do in accordance with her contract and the capacity and place in which she is so employed;"

51. Section 139 of the Employment Rights Act 1996 (ERA)

"139 Redundancy.

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish".

52. Section 18(4) of the Equality Act 2010

"18 Pregnancy and maternity discrimination: work cases

…

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

53. 80F Statutory right to request contract variation

(1) A qualifying employee may apply to his employer for a change in his terms and conditions of employment if—

(a) the change relates to—

(i) the hours he is required to work,

(ii) the times when he is required to work,

(iii) where, as between his home and a place of business of his employer, he is required to work, or

(iv) such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations,

(2) An application under this section must—

(a) state that it is such an application,

(b) specify the change applied for and the date on which it is proposed the change should become effective,

(c) explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with,

(3) . . . .

(4) If an employee has made an application under this section, he may not make a further application under this section to the same employer before the end of the period of twelve months beginning with the date on which the previous application was made.

(5) The Secretary of State may by regulations make provision about—

(a) the form of applications under this section, and

(b) when such an application is to be taken as made.

(6) . . . .

(7) . . . .

(8) For the purposes of this section, an employee is—

(a) a qualifying employee if he—

(i) satisfies such conditions as to duration of employment as the Secretary of State may specify by regulations, and

(ii) is not an agency worker (other than an agency worker who is returning to work from a period of parental leave under regulations under section 76)];

(b) an agency worker if he is supplied by a person ("the agent") to do work for another ("the principal") under a contract or other arrangement made between the agent and the principal.

(9) Regulations under this section may make different provision for different cases.

(10) . . . ."

54. Section 47E of the ERA 1996

47E Flexible working

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the employee—

(a) made (or proposed to make) an application under section 80F…

55. The Tribunal was handed a copy of the Equality and Human Rights Commission in conjunction with ACAS Guidance on "Managing

Redundancy for Pregnant Employees or those on Maternity Leave". The following are relevant extracts from this guidance: -

> Page 5 – Is the redundancy genuine?
> *"You may find during a woman's maternity leave that you can manage without her by redistributing or reorganising the work. This is not a valid reason to make her redundant.*
>
> *Dismissing her is likely to be unlawful discrimination (and automatically unfair dismissal) because the woman would not have lost her job if she had not had to take time off work to have a baby.*
> *"If you have decided that you need fewer employees you need to go through a fair redundancy selection process, ensuring that the woman who has been absent on maternity leave is not disadvantaged."*
>
> Page 6 – How do I consult employees on maternity leave?
> *"You should consult employees at risk who are on maternity leave (or off work with pregnancy-related sickness) about proposed redundancies, giving as much warning as possible. This includes employees on fixed-term contracts.*
>
> *You need to talk about:*
> - *reasons for redundancy and the posts affected*
> - *considering alternatives, such as voluntary redundancies, or reduced working hours*
> - *the selection criteria for those employees at risk of redundancy*
> - *how the employee's redundancy selection assessment was carried out*
> - *any suitable alternative work.*
>
> *If you don't consult, even if it's because you have a genuine concern not to worry or disturb an employee during her maternity leave or when she is off work with pregnancy-related sickness, this is likely to be discrimination, as well as making the process unfair.*
>
> *Try and agree the least intrusive and least stressful methods of keeping in touch before your employee goes on maternity leave."*

Submissions

56. Both Counsel handed up written submissions and it is not proposed to recite those again in these Reasons.

Conclusions

Regulation 18 – Maternity and Parental Leave Regulations 1999

57. The Claimant had a right to return to the job in which she was employed before her absence, that was a full-time role in Payroll and Pensions. It was

not a role in just part of the team but working between the two on a full-time basis. Legislation gave the Claimant a right to return to that role unless it was not reasonably practicable to return to it.

58. That Regulation however does not apply where Regulations 10 applies.

59. This Tribunal is satisfied that Regulation 10 did apply in the circumstances of this case. Despite what the Respondents says the Tribunal is satisfied that the circumstances fell within Section 139 of the Employment Rights Act 1996 in that the requirement for employees to perform a payroll and pensions role had diminished. It was not within Regulation 10 'practicable by reason of redundancy for the employer to continue to employer her under her existing contract of employment.' That is evidenced by the fact that when the Claimant went on maternity leave and thereafter there was only somebody on a temporary basis for 2 days a week in Pensions, her Payroll work was not covered but absorbed within the team, but further one of the people working in Payroll reduced her hours. The employer had concluded that it required less people within the team and this is supported by Mr Seaman's evidence that at the beginning of the Claimant's maternity leave they had come to the conclusion that so far as resources where concerned all that was needed was temporary cover within the Pensions team. Further he stated that a decision in respect of the available role for the Claimant was made by him prior to the meeting to discuss the Claimant's request for flexible working. The Respondent had already decided that it required fewer people within the team, there was a redundancy situation and the provisions of Regulation 10 applied.

60. Regulation 10(2) provides that where there is a suitable available vacancy in such redundancy circumstances the employee is entitled to be offered before the end of her employment under her existing contract alternative employment with her employer. The Respondent did not consider this. It did not enter in to any consultation with the Claimant and/or her Trade Union regarding this redundancy situation and no alternative vacancy was offered to the Claimant.

61. Further the Claimant had a contractual right to agree any changes to her contractual duties either personally or through her union or other representative. There was no discussion with the Claimant or her trade union at the commencement of her maternity leave that her role of joint payroll and pensions was no longer required.

<u>Pregnancy and maternity discrimination under Section 18(4) of the Equality Act 2010</u>

62. The Tribunal therefore must conclude that the Claimant was indeed subjected to unfavourable treatment because of her pregnancy. The Respondent discussed and decided that they did not need her resource in the department while she was absent on maternity leave. It was that absence that lead to her not being party to that discussion and no other consultation taking place with her or her Trade Union.

Detriment for making a flexible working request under Section 47(E) ERA

63. The Tribunal does not uphold this claim. It follows from the Tribunal's findings and conclusions above that it is satisfied that the detrimental treatment that the Claimant suffered had occurred prior to her making the flexible working request. It was not as has been argued on her behalf that she was told she was not entitled to return to her former role because she had made the request, but because the Respondent had already come to that decision.

64. The Tribunal however has concluded with regard to the flexible working request that the Respondent did not deal with this in accordance with the legislation or indeed its own policy. The request by the Claimant was not actually a request to work in her previous job flexibly, but she herself had requested that this be 2 days a week in Payroll only. At no time did the Respondent write to her and explain it's business reasons why she could no longer work in Payroll. The Claimant asked for this to be explained but it never was.

Constructive Unfair Dismissal

65. The Tribunal accepts the submissions made on the Claimant's behalf that the Respondent acted in breach of the Claimant's contract which provided at Clause 7(A): -

> *"Your main duties are outlined in your job description (copy attached) this may be reviewed from time to time by the Company and any changes agreed either with yourself, your representative or by Union representation."*

66. As has been submitted unilaterally, without any form of re-organisation or redundancy involving the departments the Respondent removed the Claimant's job duties and in fact her entire job role. This must amount to a fundamental breach of her employment contract. The Claimant accepted the breach and resigned.

67. Even though the Claimant's request for flexible working was for 2 days a week in Payroll after the meeting she had with the Respondent she made it clear that she might also consider full time working but also asked them on several occasions to confirm why she could not come back to Payroll. They never replied to that request. Viewed objectively that must amount to a breach of the implied term of trust and confidence where the Claimant had a statutory right to return to her old role and her employer would not set out in writing for her why that was no longer possible.

68. Even if the Employment Tribunal were wrong in its conclusion that there had in law been a redundancy situation there was on any reading of the situation a restructuring/re-organisation and again there was no consultation about this with the Claimant due to her absence on maternity leave. The decision

had already been made that the Claimant would not return to her Payroll and Pensions job prior to the request being made for flexible working. She was it has been submitted in a pool of 1 treated differently in the way that the reallocation of her work was managed.

CASE MANAGEMENT ORDER

1. The parties are to advise within 28 days of the promulgation of these Reasons whether they require a remedy hearing and if so, to provide an agreed list of issues to be determined and their joint time estimate for that hearing.

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Employment Judge Laidler, Bury St Edmunds
Date: 23 August 2017
JUDGMENT SENT TO THE PARTIES ON

.....23 August 2017.....

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FOR THE SECRETARY TO THE TRIBUNALS